

PHILLIPS PETROLEUM CO.

IBLA 87-97

Decided November 17, 1988

Appeal from a decision of the Miles City District Office, Montana, Bureau of Land Management, directing Phillips Petroleum Company to sign and return a Fluids Disposal Permit for salt water disposal into a dry well.

Reversed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Public Lands: Leases and Permits--Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Nature of Interest Granted

BLM does not have the authority under section 302(b) of FLPMA, 43 U.S.C. | 1732(b) (1982), and the regulations at 43 CFR Part 2920, to require a permit for the disposal of salt water into a dry well located on land where the surface is privately owned and the minerals are owned by the United States.

APPEARANCES: John M. Battiato, Esq., Denver, Colorado, for Phillips Petroleum Company; Richard K. Aldrich, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Phillips Petroleum Company (Phillips) has appealed from a September 16, 1986, decision by the Miles City District Office, Montana, Bureau of Land Management (BLM), which directs Phillips to sign and return a "Fluids Disposal Permit" for the disposal of salt water (SWD permit) into the Greyo Well #1-13 located in lot 13, sec. 6, T. 11 N., R. 32 E., Rosebud County, Montana. The surface to the land where the well is located is privately owned, while the mineral rights are owned by the United States.

North American Royalties, Inc. (North American), operating under Federal oil and gas lease M-19543, drilled the Greyo Well #1-13 in 1973. The case file contains a copy of the "Shut-In Well Data Sheet," which discloses that North American drilled the well to a depth of 5,600 feet, that "no oil or gas production was found," and that the well was shut-in on September 18, 1973, "pending use as SWD [salt water disposal] well." The case file contains a letter dated December 1, 1975, in which North American informed Geological Survey (GS) that "this well and the surrounding property was sold to Phillips Petroleum Company on April 1, 1974." By letter dated March 14, 1977, to GS, Phillips requested "approval to use Well #1-13 on the

subject lease for disposal of produced water." On March 25, 1977, GS granted such approval.

Documents in the case file further indicate that Phillips contacted BLM prior to the expiration date of M-19543 to inquire about the possibility of acquiring authorization to continue to use the well for salt water disposal. Apparently, BLM was undecided about the proper course of action, and although the lease expired, Phillips continued to operate the well while at the same time seeking some sort of authorization for its operations from BLM.

By letter dated January 17, 1986, BLM informed Phillips as follows:

The well was approved on lease M-19543 which expired on September 30, 1981 and consequently the well has remained in an unapproved status since that time. Although the well is located on private surface, disposal is into the federal mineral estate which requires federal approval. Approval to continue disposal operations may be obtained by submitting a Fluids Disposal Permit to our office. A copy of the permit and bond applications are enclosed. Approval from EPA [Environmental Protection Agency] for this disposal well is also necessary. We also suggest that you obtain the consent of the Surface Owner for these operations.

Phillips responded by letter dated February 12, 1986, submitting (1) a completed application for fluids disposal; (2) a blanket surety bond executed on behalf of Phillips; and (3) a "Salt Water Disposal Well Easement" executed by the surface owner, Audrey J. Henry. Phillips stated that "the subject well is disposing into a non-hydrocarbon bearing formation." Phillips added that "[t]he only permit regulations that we are aware of are found in 43 CFR 2800. We interpret that these regulations deal with temporary use permits and rights of way, but do not address SWD requirements."

By memorandum dated March 5, 1986, the Area Manager, Powder River Resource Area, requested that the Assistant District Manager, Minerals Division, Miles City District Office, provide a "brief assessment of the impact this action may have on federal mineral interests in the area," explaining that "[w]hile Phillips indicates no hydrocarbon values to be present they do not address depth of the disposal zone or presence of other mineral values subject to the reservation of federal mineral interests."

By memorandum dated March 20, 1986, the Assistant District Manager responded as follows:

The subject disposal well is located within the boundaries of High Five Field which was discovered in 1972. It produces from the Lower Tyler Stensvad sand which is a fine to medium grained, fluvial sand. Orders 33-A-77 and 70-A-78 allow for disposal into the First Cat Creek and Stensvad. According to the well file, water is disposed into the First Cat Creek in the well in question. There is 1460 feet of section between the First Cat Creek

and Stensvad and so there should be no communication between the two zones.

By letter dated April 23, 1986, BLM mailed to Phillips two copies of permit No. M67104 for the Greyo Well #1-13, subject to certain stipulations. Phillips' refusal to return the permit prompted BLM's September 16, 1986, letter which provided:

The above referenced well continues to be operated without proper BLM authorization. Our letter dated April 23, 1986, included a Fluids Disposal Permit which has not been returned to our office, in part because the stipulations were unacceptable. Enclosed are stipulations for the permit which supersede the original stipulations and become part of the permit.

To receive proper BLM authorization to operate the well, please sign and return the permit to our office within 30 days upon receipt of this letter. Failure to submit the permit within the time frame will result in our initiating plugging procedures for the well.

In its statement of reasons (SOR) for appeal from BLM's September 16, 1986, letter, Phillips advances three arguments as to why BLM erred in requiring the submission of an SWD permit in this case. First, Phillips argues that BLM lacks jurisdiction to require such a permit in the "split estate" context. Phillips cites United States v. 43.42 Acres, 520 F. Supp. 1042, 1046 (W.D. La. 1981), for the proposition that "the mineral owner does not own the subsurface strata in which the minerals are located" (SOR at 2). Further, Phillips reasons that once the mineral owner removes the minerals, "his estate in the land ends and any interest in the space occupied by the minerals reverts to the surface owner * * *." Id. Phillips concludes that "[s]ince the federal government has no rights in the strata into which the Greyo well is injecting, the BLM cannot exercise jurisdiction with respect to that strata, and hence do indirectly (through its permit structure) what it could not do directly." Id.

In connection with its first argument, Phillips takes issue with BLM's reliance upon an October 24, 1984, memorandum to the Director of BLM from the Associate Solicitor, Energy and Resources. In that memorandum, the Associate Solicitor states:

You have requested our advice concerning your authority, in the absence of an oil and gas lease, to allow use of wells for either disposal of produced water or for enhanced recovery injection. Your particular concerns are situations where the surface is not owned by the government (split-estate). We conclude that you may require a permit for use of a well for disposal of produced water under | 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1732(b), but that you may only allow use of a well for enhanced recovery injection under an oil and gas lease or subsurface storage agreement.

(Memorandum dated Oct. 24, 1984, at 1).

Phillips argues that section 302(b) of FLPMA, 43 U.S.C. | 1732(b) (1982), does not authorize the SWD permit requirement. Phillips contends that "the import of FLPMA was to create a comprehensive and updated system for management and disposal of public lands by the BLM, not a statute regulating or affecting oil and gas operations" (SOR at 3). Moreover, according to Phillips, section 302 of FLPMA concerns "use, occupancy and development of 'public lands,'" whereas, the Greyo well is located on a tract and injects into strata which are privately owned. Id.

Phillips second major argument is that "the permit requirement is procedurally suspect in that it was developed 'in-house,' on a local level and a regulatory framework was conveniently found applicable thereafter." Id.

Finally, Phillips challenges BLM's requirement that the permit be accompanied by a \$10,000 surety or personal bond as "unreasonable and unnecessary." Phillips supports this contention with the following reasoning:

It would appear that the most, if not the only, plausible (federal) argument in support of an injection permit is to allow the federal government the opportunity to evaluate the impact to the mineral estate, although it is suspected that the issuance of a permit is perfunctory rather than probative. Nevertheless, once the federal government determines that a permit should be issued, that is, it determines that the threat to the mineral estate is non-existent or should be assumed, then the permit procedure should be at an end. There is nothing to indemnify. However, if the reason for requiring a bond is to insure the operator's ability to plug the well, then the bond requirement is inconsistent with the reason for the permit. Moreover, the bond is unnecessary since the Environmental Protection Agency (EPA) pursuant to the Underground Injection Control Program, 40 CFR | 144 et. seq., promulgated under the Safe Drinking Water Act, 42 U.S.C. | 300 et. seq., already requires evidence of financial responsibility to close, plug or abandon an injection well. The BLM's injection bond unnecessarily creates a multiple bonding situation with the EPA.

Id.

BLM based its policy of requiring an operator to obtain an SWD permit in the split-estate context upon section 302(b) of FLPMA, 43 U.S.C. | 1732(b) (1982), which provides:

In managing the public lands, the Secretary shall, subject to this Act and other applicable law and under such terms and conditions as are consistent with such law, regulate, through easements, permits, leases, licences, published rules, or other instruments as the Secretary deems appropriate, the use, occupancy, and development of the public lands * * *. [Emphasis added.]

Section 103(e) of FLPMA, 43 U.S.C. | 1702(e) (1982), defines the term "public lands" as "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management * * *." (Emphasis added.)

In Instruction Memorandum (IM) No. MT-85-339, the Montana State Director explained to Montana's District Managers that BLM "has had a longstanding problem with how to permit or authorize salt water/waste fluid disposal (SWD/WFD) in oil producing areas when the disposal is not associated with oil and gas lease rights. This has been especially true where the surface is privately owned and the minerals are federally owned." The State Director set forth the following rationale for authorizing such disposal pursuant to a section 302(b) permit:

Pursuant to FLPMA, and an October 24, 1984, memorandum from the Office of the Solicitor, Washington, D.C. * * *, the Montana State Office has developed a permitting process for allowing the disposal of water on federal mineral acreage when such disposal is not connected with on-lease, on-Unit or on-Communitization Agreement federal production. This process will be in the form of a FLPMA Section 302(b) permit and will be processed by the district offices. The permit is BLM's authorization to inject fluids for the purpose of disposal into the subsurface, based upon BLM's determination that federal minerals will not be adversely impacted by the operation. Montana State Office Form 3160-2, "Application and Permit for Fluids Disposal" * * *, should be submitted by the operator for processing and ultimate BLM approval or denial. Presently, the filing fee and charge for these permits is \$125. We are researching a fair market value per barrel charge, as well as other options, and will, at some future date, initiate this charge on all new and renewal permits.

(IM No. MT-85-339 at 2).

In Information Bulletin No. MT-86-6 (Oct. 7, 1985), the Deputy State Director, Division of Mineral Resources, clarified IM No. MT-85-339. In answer to questions regarding the proper grounds for rejecting an SWD permit, the Deputy State Director stated: "The [District Offices] can always reject or modify an application for cause. However, this cause should be based primarily on whether or not the federal mineral estate would be adversely affected by injection, regardless of origin of the fluid being injected, or the status of the well at lease expiration."

[1] For the reasons set forth below, we reject the argument that section 302(b) of FLPMA confers upon BLM the authority to require Phillips to submit an SWD permit and an accompanying bond. In Mallon Oil Co., 104 IBLA 145 (1988), BLM issued a right-of-way which included, inter alia, use of an existing well for salt water disposal. BLM threatened cancellation of the right-of-way in the absence of rental payment, which included a per-barrel charge for disposal of salt water, and submission of a bond. On appeal to the Board, Mallon argued, inter alia, "that BLM cannot charge rental for the use of the subsurface void into which the waste water is being disposed

because the United States, as owner of the surface, does not own the subsurface void." 104 IBLA at 148. The Board's response to this argument is relevant to our consideration of whether BLM, in its capacity as custodian of the mineral estate in this case, has the authority to require Phillips to file for an SWD permit. The Board's analysis of this issue is set forth below:

In appraising the fair market value for the disposal of the water, BLM assumed that the United States, as the surface owner, owned the subsurface void areas into which the water would be injected. Although Mallon contends that the United States does not own the subsurface void areas, it has offered no support for this contention. The general rule in the United States appears to be that, once the minerals have been removed from the soil, the space occupied by the minerals reverts to the surface owner by operation of law. See, e.g., Enemy v. United States, 412 F.2d 1313 (Ct. Cl. 1969); United States v. 43.42 Acres of Land, 520 F. Supp. 1042, 1045-1046 (W.D. La. 1981); Ellis v. Arkansas Louisiana Gas Co., 450 F. Supp. 412, 421 (E.D. Okla. 1978); 54 Am. Jur. 2d Mines and Minerals | 162 (1948). This rule stems from the general interpretation of a mineral grant as giving the grantee the right to explore for, produce, and reduce to possession if found, the minerals granted, but not the stratum of rock containing the minerals. See, e.g., Ellis v. Arkansas Louisiana Gas Co., supra at 421; see also United States v. 43.42 Acres of Land, supra at 1046. There is no evidence that Montana law, which applies to the land at issue here, would differ from the general American rule, although no decisions applying Montana law to this issue have come to our attention. We, therefore, must affirm the BLM finding that the United States, as the surface owner, also owns the subsurface void into which Mallon disposes its waste water. Thus BLM may properly charge fair market rental for the use of this void.

104 IBLA at 150.

We have no doubt that the mineral estate involved in the instant case meets the definition of "public lands" under sections 302(b) and 103(e) of FLPMA. However, that fact alone does not confer upon BLM the authority to require an operator to obtain a permit for the injection of salt water into subsurface strata which are privately owned. In the instant case, the record indicates not only that Phillips proposes to inject salt water into subsurface strata which are privately owned, but also that the salt water will not affect the Federal mineral estate. As earlier noted, in response to a request from the Area Manager, Powder River Resource Area, the Assistant District Manager, Minerals Division, Miles City District Office, stated: "According to the well file, water is disposed into the First Cat Creek in the well in question. There is 1460 feet of section between the First Cat Creek and Stensvad and so there should be no communication between the two zones" (Memorandum dated Mar. 20, 1986). We conclude that BLM does not have the authority under section 302(b) of FLPMA to require an operator to obtain a permit for activities which will take place on private

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land and which will not, according to BLM's own information, affect the United States' interest.

Counsel for BLM recognizes that BLM does not own the subsurface strata into which Phillips proposes to inject its salt water (BLM Answer at 2). He emphasizes that the SWD permit process was developed as a means of protecting the United States' mineral interest which could be affected by the disposal of salt water or other fluid waste. He offers the following reasons as to why such a permit process is necessary:

First, the requirement of a permit is necessary so that BLM is informed of activities on public lands or interests in public lands, which may adversely affect the interests in public lands. The requirement of a permit compels organizations like Appellant to advise BLM of their activities which might interfere with the BLM mineral estate. Second, the permit process gives BLM an opportunity to review the activity for impact upon interests of the United States and to impose necessary stipulations to protect the United States. Finally, it provides an opportunity for BLM to require a bond to compel compliance with permit stipulations regarding plugging of holes and insuring that no impact on federal mineral interests will occur.

(SOR at 2).

We recognize that in certain cases the injection of salt water into abandoned oil and gas wells could adversely affect the mineral interest owned by the United States. 1/ However, we reject the notion that section 302(b) of FLPMA is the proper vehicle for detecting and preventing possible adverse impacts. The case file contains materials relating to the permitting requirements under regulations promulgated by the EPA for salt water injection wells. See 40 CFR Parts 124, 144, 146, and 147. We believe BLM's involvement in the EPA permitting process in those instances where an operator's injection activities might adversely affect the United States' mineral interest will afford sufficient protection. 2/

1/ In this connection, we note the inconsistency pointed out by counsel for Phillips in the framework devised by BLM under section 302(b) of FLPMA. If, based upon an operator's permit application, BLM determines that there is a threat to the mineral estate, it is logical to assume that BLM would deny the permit. On the other hand, if there is no threat, in which case BLM would issue the permit, there is no need for a bond, since BLM's approval is based upon the assumption that there is no likely adverse impact.

2/ EPA regulation 40 CFR 124.10 requires public notice of all permit actions, including those which relate to wells used for the injection of "fluids * * * [w]hich are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production." 40 CFR 144.6(b). In addition to specific methods of public notice described at 40 CFR 124.10, the regulation includes "[a]ny other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it." 40 CFR 124.10(c)(4). Presumably,

Finally, we note that an operator would be liable to the United States for damages should its water injection activities adversely affect the United States owned mineral interest. See, e.g., Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir.), cert. denied, 375 U.S. 942 (1963); Jackson v. State Corp. Comm'n, 348 P.2d 613 (Kan. 1960).

We conclude that BLM's requirement that Phillips submit an SWD permit and an accompanying bond is not authorized by section 302(b) of FLPMA, 43 U.S.C. | 1732(b) (1982), and 43 CFR Part 2920.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

John H. Kelly
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge

fn. 2 (continued)

the public notice procedures would ensure BLM's receipt of notice that an operator is seeking a permit for the disposal of salt water into a well located on privately owned land where the underlying mineral estate is owned by the United States. Should BLM, based upon available information, conclude that there is a possibility that the salt water injection activities will adversely affect the mineral interest, it could file comments to that effect in accordance with 40 CFR 124.11, and participate in any public hearing regarding the proposed activities which takes place under 40 CFR 124.12.